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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

LISA M. OSTELLA,
Plaintiff,
v.

ORLY TAITZ,
Defendant.

Case No. 8:11-CV-00485-AG (AJW)

**OPPOSITION TO MOTION TO
DISMISS/STRIKE**

Date of Hearing: December 18, 2017
Time of Hearing: 10:00 a.m.
Judge: Hon. Andrew Guilford
Courtroom: 10D

Pre-Trial Conference: February 26, 2018

Trial Date: March 27, 2018

ORLY TAITZ and DEFEND OUR
FREEDOMS FOUNDATION, INC.,

Counterclaimants,

v.

LISA M. OSTELLA and PHILIP BERG,
Counterclaim Defendants.

Caption continued next page

1 ORLY TAITZ and DEFEND OUR
2 FREEDOMS FOUNDATION, INC.,

3 Third Party Complaint Plaintiffs,

4 v.

5 SHIRLEY WADDELL, DONNA
6 ANDERS, MATHEW TILGHMAN and
7 ROES 1-10,

8 Third Party Complaint Defendants.

9
10 **TO THE COURT, ALL PARTIES, AND/OR THEIR ATTORNEYS OF**
11 **RECORD:**

12 **COME NOW** Defendants, Counterclaimants, and Third Party Complaint
13 Plaintiffs ORLY TAITZ (“Taitz”) and Defend Our Freedoms Foundation, Inc.
14 (“DOFF”) and hereby submit their Opposition to Plaintiff Lisa Ostella’s Motion to
15 Dismiss and/or Strike Defendants’ Counterclaim and Third Party Complaint
16

17 DATED: December 7, 2017

LAW OFFICES OF ORLY TAITZ

18
19 By: /Orly Taitz/
20 Orly Taitz, Esq.
21 Attorney for Counterclaimants and
22 Third Party Complaint Plaintiffs,
23 ORLY TAITZ and DEFEND OUR
24 FREEDOMS FOUNDATION, INC.

25 DATED: December 7, 2017

**THE LAW FIRM OF MARC STEVEN
COLEN**

26 By: /Marc Steven Colen
27 Marc Steven Colen, Esq.
28 Attorney for Counterclaimants and
Third Party Complaint Plaintiffs,
ORLY TAITZ and DEFEND OUR
FREEDOMS FOUNDATION, INC.

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I. INTRODUCTION AND SHORT STATEMENT OF THE CASE

This case revolves around the actions of Lisa Ostella, former web master for Orly Taitz's Defend Our Freedoms Foundation ("DOFF"). Ostella offered Orly Taitz, president of DOFF, to register web addresses for Taitz's foundation in order to create a website and a PayPal account to collect donations to help cover expenses of Taitz and her foundation.

After about three months, Ostella blocked Taitz out of a website for the foundation and continued running the website using the picture of Taitz on the front page of the website, using the name of the foundation and the web address of the foundation and replaced the foundation PayPal account with her personal PayPal account at "donate" button of the website. In doing so, she solicited donations for her own use.

Taitz had to create a new website and for a limited period of time, one month, between mid-April to mid-May of 2009, posted notations on the new website advising the public that the website that is managed by Ostella is not connected to Defend Our Freedoms Foundation and all donations given there would not go to the foundation, but instead to Ostella personally.

In 2011 Taitz made one update, advising the public that after two years there was no response to her complaint to the FBI in relation to the aforementioned activities of Ostella.

On December 20, 2010 Ostella testified under penalty of perjury during a court hearing in this case wherein she admitted to locking Taitz out of the website and related PayPal accounts. Hon. Eduardo Robreno, then presiding judge in this case, issued the binding ruling and factual finding that,

"On Cross Examination, Ostella conceded that she has locked Taitz out of her website www.defendourfreedoms.org and her associated PayPal accounts"

Memorandum of Judge Eduardo Robreno 12.23.2010 DKT 376-2 Liberi v

1 Taitz 11-cv-485 AG.

2 Ostella also used the website of DOFF to promote another attorney, Philip
3 Berg, who also solicited donations. Thus, while Ostella admitted to locking Taitz
4 and DOFF from the website and continuing to collect donations to the financial
5 detriment of Taitz, and while Taitz's speech was found to be privileged speech¹,
6 Ostella colluded with her prior attorney, Philip Berg, with the purpose of retaliating
7 against Taitz for disclosures made by Taitz. Ostella engaged and is engaging in
8 ongoing vicious defamation of Taitz, of Taitz's husband and of donors and
9 supporters of Taitz, particularly those who dared to speak up about actions by
10 Ostella.

11 For example, Ostella and Berg fabricated outrageous and defamatory
12 statements including that Taitz sought to have Ostella's children professionally
13 kidnapped, that she sought to hire a hitman to kill Ostella's children, and that the
14 husband of Taitz is hacking into people's computers and spying on people. By her
15 own admission, Ostella instigated a criminal court hearing in New Jersey, where
16 Ostella claimed that Taitz threatened to kidnap Ostella's children. That case was
17 immediately dismissed, however those horrific defamatory allegations destroyed the
18 reputation of Taitz, who is a licensed attorney and a licensed doctor of Dental
19 Surgery. Later, during 12.20.2010 hearing before Judge Robreno in this case at
20 hand, Ostella admitted under oath that allegations of Taitz threatening to kidnap
21 Ostella's children, were a fabrication by her and her attorney.

22 Ostella also fabricated defamatory allegations that Taitz allowed Ostella to
23 forge Taitz's signature. Ostella also made fabrications to the effect that donors and

24
25 ¹ Further, The Court of Appeals found that Taitz engaged in protected activities
26 under the anti-SLAPP statute based on free speech on matters of public importance.
27 (Court of Appeals Case No. 13-56253; Dkt. No. 676.)
28

1 supporters of Taitz were and are engaged in forgery, hacking into computers, and
 2 stalking of Ostella. Ostella filed frivolous legal actions against the husband of Taitz
 3 and his company, Daylight Chemical. Those were dismissed by Hon. Andrew
 4 Guilford. Additionally, Ostella filed legal actions against some 20 other individuals
 5 and entities connected to Taitz. All of those were dismissed by Hon. Andrew
 6 Guilford. Other cases were dismissed in the courts in Pennsylvania, Texas and
 7 Florida. All of those frivolous actions were a scorched earth policy of retaliation by
 8 Ostella for Taitz honestly stating that Ostella locked Taitz out and ran a web site
 9 using the picture of Taitz and the name of Defend Our Freedoms foundation and
 10 collected donations to herself through that web site making donors believe that this
 11 is the web site of DOFF. Exhibits 2 and 3 of the counter complaint show printouts
 12 from the internet archive of the website, which was managed by Ostella using the
 13 picture of Taitz and the name of DOFF, while Ostella no longer had any connection
 14 to DOFF.

15 Ostella continues the holdover of the web addresses of the DOFF to this day,
 16 hereby depriving DOFF of donations. Indeed, as presented in detail in the Counter-
 17 Complaint, Ostella is engaged in a racketeering scheme together with her former
 18 attorney, Berg, to deprive Taitz and DOFF of donations and defame Taitz.

19 20 **II. LEGAL ARGUMENT**

21
 22 A defendant may move to dismiss a complaint if it believes that the plaintiff
 23 has failed to state a claim for relief. Fed. R. Civ. P. 12(b)(6). All claims in the
 24 Counter-Complaint are well pled, with quotations and citations to documents in the
 25 Court's docket. Fed. R. Civ. P. 8(a)(2) requires only "a short and plain statement of
 26 the claim showing that the pleader is entitled to relief." With that liberal pleading
 27 standard, the purpose of a motion under Rule 12(b)(6) is "to test the formal
 28 sufficiency of the statement of the claim for relief." Wright & A. Miller, Federal

1 Practice and Procedure § 1356, p. 354 (3d ed. 2004).

2 To survive a motion to dismiss, a complaint must contain sufficient factual
3 material to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*
4 *Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when “the plaintiff
5 pleads factual content that allows the court to draw the reasonable inference that the
6 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
7 (2009). If anything, Taitz may have placed more into the Counter-Complaint than
8 was actually the minimum needed.

9 In analyzing the complaint’s sufficiency, a court must “accept[] all factual
10 allegations in the complaint as true and constru[e] them in the light most favorable
11 to the nonmoving party.” *Skilstaf v. CVS Caremark*, 669 Fed 3d 1005, 1014 (9th Cir.,
12 2012) (citing *Newdow v. Lafevre*, 598 F. 3d 628, 642 (9th Cir. 2010)). But the
13 assumption of truth does not apply to legal conclusions. *Ashcroft*, 556 U.S. at 678.
14 Further, *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338
15 (1989) (“Rule 12(b)(6) does not countenance ... dismissals based on a judge's
16 disbelief of a complaint's factual allegations”); *Scheuer v. Rhodes*, 416 U.S. 232,
17 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed
18 even if it appears “that a recovery is very remote and unlikely”).

19 Unresolved factual disputes precluded a ruling on a motion to dismiss.
20 Whether consumers have been or will be misled as required to state a claim of false
21 advertising under California law is a factual question that cannot be resolved on a
22 motion to dismiss for failure to state a claim upon which relief can be granted.
23 *Brewer v. Indymac Bank*, E.D.Cal. 2009, 609 F.Supp.2d 1104, 1108.

24 Motions to dismiss complaint for failure to state a claim upon which relief can
25 be granted are viewed with disfavor because of possible waste of time in case of
26 reversal of a dismissal of the action, and because primary objective of the law is to
27 obtain a determination of the merits of any claim, and therefore a case should be
28 tried on the proofs rather than the pleadings. *Rennie & Laughlin, Inc. v. Chrysler*

1 *Corp.*, C.A.9 (Cal.) 1957, 242 F.2d 208, 211.

2 Fraud claims must satisfy the heightened pleading standards of Federal Rule
3 of Civil Procedure 9(b). *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1031
4 (9th Cir. 2016). Rule 9(b) requires a party to “state with particularity the
5 circumstances constituting fraud or mistake.” The “circumstances” include “the
6 time, place, and specific content of false representations as well as the identities of
7 the parties.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007) (quoting
8 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th
9 Cir.1986)).

10 A plaintiff cannot simply allege “neutral facts necessary to identify the
11 transaction,” but must “set forth an explanation as to why the statement or omission
12 complained of was false or misleading.” *Cooper v. Pickett*, 137 F.3d 616, 625 (9th
13 Cir. 1997) But even under Rule 9(b), the pleading standard for state of mind is more
14 relaxed. See Fed. R. Civ. P. 9(b) (“Malice, intent, knowledge, and other conditions
15 of a person’s mind may be alleged generally”)

16 In the event that any of Taitz’s and DOFF’s claims are deemed insufficient,
17 Taitz and DOFF must be granted leave of court to file a First Amended
18 Counterclaim and Third Party Complaint. Leave to amend should be granted unless
19 the district court “determines that the pleading could not possibly be cured by the
20 allegation of other facts,” *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th
21 Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc)),
22 or “if the plaintiff had several opportunities to amend its complaint and repeatedly
23 failed to cure deficiencies.” *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003
24 (9th Cir. 2010) (citation omitted).

25
26 **III. OSTELLA’S MOTION TO DISMISS THE COUNTER COMPLAINT**
27 **SHOULD BE STRICKEN, AS IT WAS FILED WITHOUT A LEAVE OF**
28 **COURT, WITHOUT A MEET AND CONFER OF COUNSEL AND IN**

VIOLATION OF LOCAL RULES

In this case the court set a pre-filing restrictions, where a party needs to submit a short (two page) letter to this Court requesting leave of court to file a motion. (Dkt No 227). Ostella did not obtain a leave of court to file a motion to dismiss at hand and she did not even submit a letter to the court requesting a leave of court to file such a motion. Further, Ostella's attorney did not conduct the necessary meet and confer with the opposing counsel prior to filing this motion. See Local Rule 7-3. Additionally, local rules require 28 days between filing a motion and a hearing. According to L.R. 7-9 opposition to motion is due 21 days before the hearing. Ostella.s attorney, Florida attorney, Mr. Lorenzo, who is representing Ostella pro hac vice, set a motion within 17 days from filing. He made it impossible to file the opposition 21 days before the hearing. He did not allow the Court required time to review the pleadings.

Counter Plaintiffs Taitz and DOFF lodged with the court on December 7, 2017 an emergency ex-parte motion requesting the court to strike this motion to dismiss that was filed without the required leave of court and in violation of local rules, without giving opposition any time to respond. Dkt No769. Since no response from the court was received, counter plaintiffs are filing this opposition at hand.

It is noteworthy that Defendant and Counter-Plaintiff Taitz followed the rules. She submitted to this court a required two-page letter seeking a leave of court to dismiss the Second Amended Complaint (SAC). When 21 days past and the court did not respond to the request, Taitz filed an answer to the SAC with the reservation of rights. Plaintiff and counter -defendant Ostella was obligated to do the same. She was obligated to file an answer to the counter-complaint within 21 days. She did not do so. As such, this court should strike this motion to dismiss as it was filed without a leave of court to do so and grant Taitz and DOFF a default judgment against Ostella on their counter-complaint.

**IV. TAITZ DID NOT NEED TO SEEK JOINDER OF
DEFEND OUR FREEDOMS FOUNDATION**

Defend Our Freedoms Foundation has been a party in this case since the case was filed. Moreover, Taitz and DOFF sought a dismissal of the First Amended Complaint by Philip Berg, who did not file any opposition to motions to dismiss. Since this court never issued an order to dismiss the First Amended Complaint by Plaintiff Berg against DOFF, DOFF remained a party in this case and a joinder was not required. [Additionally, Ostella erroneously refers to document Dkt No 719. This document was filed a year ago, on November 14, 2016, and is a Notice of Joinder with Taitz in opposition to motion by Ostella to file SAC in opposition re: Notice Of Motion And Motion to For Leave to Amend First Amended Complaint 706 filed by Defendants Defend Our Freedoms Foundations, Inc., Orly Taitz, Inc. (Taitz, Orly) (Entered: November 14, 2016)] This document was not a request for the court to allow joinder, rather it was simply a notice that on November 24, 2016 DOFF and Taitz jointly filed a motion opposing Ostella's motion to file a second amended complaint.

Additionally, in her own pleadings Ostella shows DOFF as an indispensable party: Ostella admits to locking DOFF from the website she managed as a web master and replacing DOFF PayPal account with her personal account "Ostella changed the PayPal script for the donation button to reflect her own account on defendourfreedoms.net" Liberi et al Memorandum personally signed by Ostella Dkt No 186-2, p 20 Liberi v Taitz 11-cv-485. Similarly, Ostella admitted to the same during December 20, 2010 hearing in the case at hand. Ostella admitted to hijacking the web addresses and website for DOFF, using the name and the web address of DOFF and picture of Taitz, president of DOFF, to divert donations to her own PayPal and credit card accounts. Unsuspected donors believed that they are donating to DOFF. For this reason, DOFF is an indispensable party, as Ostella's actions

1 caused significant injuries to DOFF.

2
3 **V. OSTELLA FAILS TO SHOW THAT ANY OF THE**
4 **CAUSES OF ACTION FAIL UNDER 12(b)(6)**
5

6 In her motion to dismiss under 12(b)(6) Ostella makes a general statement
7 that all the causes of action should fail. However, Ostella failed to provide any legal
8 argument, precedent or factual bases that would justify granting her 12(b)(6)
9 motion. Ostella did not address any specific causes of action and did not provide any
10 legal justification showing how these specific causes of action fail. Contrary to
11 Ostella's claims, Counter Plaintiffs provided detailed causes of action and detailed
12 proof of Ostella's direct liability, based on the pleadings and exhibits.

13
14 **VI. OSTELLA ADDRESSES ONLY ONE SET OF CLAIMS, FOR FRAUD,**
15 **AND ERRONEOUSLY CLAIMED THAT FRAUD WAS NOT PLED WITH**
16 **ADEQUATE SPECIFICITY**
17

18 Ostella attempts to negate only one set of claims, claims one through three for
19 fraud, without providing any argument relating connection to other claims.
20 However, even as these three claims is concerned, Taitz and DOFF, indeed, pled
21 fraud and misrepresentation in great detail.

22 Starting in section II, General Allegations, from paragraph 10 page 4 of the
23 counter complaint, Taitz pled in great detail her correspondence with Ostella, she
24 provided the dates of the e-mails and statements by Ostella, starting from December
25 17, 2008, which led to justifiable reliance on Ostella's offer to create a website and
26 PayPal account for DOFF. Later, on April 11, 2009, Ostella breached the trust of
27 Taitz, she blocked Taitz from the website and continued running the website using
28 the name of Defend Our Freedoms foundation, using the picture of Taitz, soliciting

1 donations for herself and for Berg and linking the donation button to her personal
2 PayPal and credit card accounts. Taitz pled fraud with required specificity, meeting
3 the requirements of FRCP 9(b). Specifically, it is stated in the counter-complaint
4 that,

5 "10. On December 17, 2008, Ostella suggested to Taitz that Taitz
6 create a PayPal account to get donations from the public to help Taitz pay for
7 expenses of her pro bono work. On December 17, 2008 Ostella sent an e-mail
8 to Taitz: "Do you want me to make you a PayPal account with your account?
9 I'll need a tax ID and I can set it up. Or wait until the foundation/ tax
10 shelter/fictious (sic) name thing is worked out? Lisa Ostella.

11 "11. On the next day, December 18, 2008, Taitz wrote to Ostella:
12 "Lisa, I thought of a name for the foundation. Defend Our Freedoms
13 Foundation. What do you think?" Within half an hour, Ostella responded:
14 "Defend Our Freedoms sounds good." Immediately after this communication,
15 Ostella, as a web master, through her company GoExcelGlobal, registered the
16 web addresses for Taitz under the name "Defend Our Freedoms" which was
17 chosen by Taitz for her foundation.

18 "12. Within hours of Taitz giving Ostella the name she chose for the
19 foundation, Ostella wrote to Taitz: "Your website is up and the domain
20 secured. It can take up to 3 days for this to be viewable
21 live.<http://www.defendourfreedoms.org>. I am also working on your youtube
22 channel:<http://www.youtube.com/user/drOnlyTV>." Ostella clearly represented
23 to Taitz that this was Taitz's website and Taitz's web addresses. Ostella
24 advised Taitz that she got a block of web addresses defendourfreedoms.com,
25 .us, .net, .org for the Defend Our Freedoms Foundation and the PayPal
26 account on the website will be linked to the account for the foundation.
27 Ostella specifically advised Taitz that she needed to register all of those web
28 addresses for the foundation so that "squatters" will not divert traffic and

1 donations from the foundation. The subsequent account for PayPal was under
2 the name DefendOurFreedoms with the primary e-mail address being
3 only.taitz@gmail.com and the primary contact being Orly Taitz. Only a few
4 months later Ostella ended up being the “squatter.”

5 “13. Based on Ostella's representations to Taitz, and acting in
6 justifiable reliance on them, Taitz allowed Ostella to assist her to create an
7 online blog and website connected to web addresses defendourfreedoms.net,
8 defendourfreedoms.com, defendourfreedoms.us, and defendourfreedoms.org.
9 Ostella had control of the blog and the website and Taitz was not aware that
10 some web masters use their position as web masters to draw personal benefit
11 from the websites they created for others.”

12 Ostella's 12(b)(6) motion does not provide any opposition to:

13 4. Fourth Claim-Conversion

14 5. Fifth Claim-RICO

15 A. First Predicate Act-Wire Fraud

16 B. Second Predicate Act-Forgery

17 C. Forgery and Alteration of an Official Document

18 D. Forgery of Tax Return

19 E. Fraud

20 6. Sixth Claim -Abuse of Process

21 7. Seventh Claim - Defamation of Character of Taitz

22 8. Eighth Claim- Fraud in Suing on Behalf of Nonexistent
23 Corporations

24 (Ostella sued on behalf of defunct GoExcelGlobal)

25 9. Ninth Claim - Fraud in Suing on Behalf of Nonexistent entity

26 10 Tenth Claim-fraud in suing against Nonexistent Entity

27 11. Eleventh Claim-Invasion of Privacy
28

(While Ostella claims that Taitz is a public figure and has a diminished expectation of privacy, this argument does not provide a justification for using illegal subpoenas, used by Ostella and Berg without proper notification to Taitz, while the case was stayed, no discovery allowed, to illegally access private PayPal bank accounts of Taitz.)

12. Twelfth Claim-Invasion of Privacy

(While Ostella claims that Taitz is a public figure and has a diminished expectation of privacy, this argument does not provide a justification for using illegal subpoenas, used by Ostella and Berg without proper notification to Taitz, while the case was stayed, no discovery allowed, to illegally access private police report of Taitz filed as an informant.)

13. Thirteenth Claim-Conversion of Web Addresses

14 Fourteenth Claim-Fraud on the Court

15. Fifteenth Claim-Unfair Competition

16. Sixteenth Claim-Common Law Unfair Competition

17 Seventeenth Claim-Cybersquatting

18. Eighteenth Claim-Trademark Dilution

19. Nineteenth Claim-Trademark Infringement

20. Twentieth Claim-Unjust Enrichment

21. Twenty First Claim-Intentional Infliction of Severe Emotional Distress

22. Twenty Second Claim- Interference with Prospective Advantage

23. Twenty Third Claim-Appropriation of Likeness

24. Twenty Fourth Claim-Malicious Prosecution

(Ostella instigating criminal prosecution of Taitz based on Ostella's false defamatory statements of alleged "criminal threats" by Taitz,

1 where Ostella claimed that Taitz threatened to have Ostella's
2 children . The case was dismissed, no criminal threats by Taitz were
3 found)

4 25. Twenty Fifth Claim-Violation of CA Uniform Trade Secrets Act
5 and Release of Confidential Information

6 26. Petition under 18 USC 3332 to Forward to Federal Grand Jury
7 Evidence of Offenses Against Criminal Laws committed by
8 Counter Defendants

9 27. Twenty Seventh Claim-Defamation

10 28. Twenty Eighth Claim-Defamation

11 Additionally, Ostella does not have standing to seek to dismiss the Third
12 Party Complaint, as it is brought against the third parties, not Ostella, and she
13 did not provide any substantive opposition to the third party complaint.

14
15 **VII. THE STATUTE OF LIMITATIONS DID NOT RUN AS**
16 **TORTIOUS BEHAVIOR OF OSTELLA IS ONGOING**
17

18 Counter-Defendant Ostella's tortious behavior is ongoing and as such the
19 statute of limitations did not run. Currently, Ostella is still fraudulently holding over
20 the codes for the web address (domains) of Defend Our Freedoms Foundation and
21 depriving Taitz and the foundation of use of those web addresses and, as such,
22 depriving DOFF and Taitz of donations. Ostella is a part of an ongoing racketeering
23 scheme with her former attorney, Philip Berg, to deprive Taitz and DOFF of
24 donations and in vicious defamation of Taitz. Ostella is still fraudulently using the e-
25 mail addresses of donors and sharing them with Berg.

26 As stated in the counter complaint and exhibit 8 to the counter complaint, as
27 recently as August 27, 2017, Berg has sent a mass e-mail to a number of those
28 addresses, to multiple donors, soliciting his book "Obamacare", where Berg

1 dedicated a whole chapter to defaming Taitz and drawing financial benefit. It shows
2 that both fraud and RICO are ongoing. Additionally, Ostella is still retaining all
3 proceeds from fraudulently using the name and likeness of Taitz and DOFF, running
4 the web site under the name of DOFF and collecting donations. Ostella engaged in
5 forgery of Taitz's signature by copying and pasting this signature from one
6 document to others. Until there is injunctive relief by this court and an award of
7 actual and punitive damages against Ostella, this tortuous behavior will continue and
8 damages will multiply.

9
10 **VIII. THE STATUTE OF LIMITATIONS DID NOT RUN AS THIS WAS**
11 **THE FIRST OPPORTUNITY FOR TAITZ AND DOFF TO FILE A**
12 **COUNTER COMPLAINT AGAINST OSTELLA**
13

14 Until the present time, Taitz challenged the original complaint and the first
15 amended complaint by Ostella. Only recently, on October 13, 2017, this court
16 allowed Ostella to file her Second Amended Complaint. Taitz submitted to court a
17 request for leave of court to dismiss the SAC under 12(b)(6), 12(b)(1) and
18 antiSLAPP 425.16. As this court did not respond within 21 days to a request for
19 leave to file motions to dismiss, Taitz filed an answer and a mandatory counter
20 complaint. Taitz did not engage in laches and did not violate a statute of limitations
21 as she filed her counter-complaint in an ongoing case at the first opportunity to do
22 so.

23 “Compulsory” counterclaims are claims that “arise[] out of the transaction or
24 occurrence that is the subject matter of the opposing party's claim.” Fed.R.Civ.P.
25 13(a). The Ninth Circuit applies a “logical relationship test” to determine whether a
26 counterclaim is compulsory. Under this test, the court “analyze[s] whether the
27 essential facts of the various claims are so logically connected that considerations of
28 judicial economy and fairness dictate that all the issues be resolved in one lawsuit.”

1 *Pochiro v. Prudential Ins. Co. of Amer.*, 827 F.2d 1246, 1249 (9th Cir.1987)
2 (quoting *Harris v. Steinem*, 571 F.2d 119, 123 (2d Cir.1978)). If a defendant fails to
3 bring a compulsory counterclaim, he is barred from asserting that claim in a future
4 proceeding. Fed.R.Civ.P. 13(a); *Sams v. Beech Aircraft*, 625 F.2d 273, 276 n. 4 (9th
5 Cir.1980) (citing *Baker v. Gold Seal Liquors*, 417 U.S. 467, 469 n. 1, 94 S.Ct. 2504,
6 41 L.Ed.2d 243 (1974)); see also *Channell v. Citicorp Nat'l Services, Inc.*, 89 F.3d
7 379, 385 (7th Cir.1996).

8 “As noted above, the Pochiros' claim that John was defamed centers around
9 statements allegedly made by Prudential in relation to John's use of Prudential's
10 confidential records. Not only do the facts necessary to prove the two claims
11 substantially overlap, but the collateral estoppel effect of Prudential's victory in the
12 first action would preclude the Pochiros from denying the truth of Prudential's
13 statements. In such a situation, the defamation claim must be considered a
14 compulsory counterclaim to the earlier action. See, e.g., *Linker v. Custom-Bilt
15 Machinery, Inc.*, 594 F.Supp. 894, 899–900 (E.D.Pa.1984) (defamation claim is
16 compulsory counterclaim to securities action); *Sikes v. Rubin Law Offices, P.C.*, 102
17 F.R.D. 259, 260–62 (N.D.Ga.1984) (libel and slander claims are compulsory
18 counterclaims to action to enjoin enforcement of a covenant not to compete);
19 *Appletree v. City of Hartford*, 555 F.Supp. 224, 229–30 (D.Conn.1983) (libel and
20 slander claims are compulsory counterclaims to civil rights action against police
21 officer); *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 86 F.R.D. 694, 697–700
22 (E.D.N.C.1980) (slander claim is compulsory counterclaim in antitrust action).”
23 *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d at 1251.

24 Fed. R. Civ. P. 15(c)(1)(C) provides the federal standard for whether a
25 pleading relates back. *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 541 (2010)
26 (“Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended
27 pleading ‘relates back’ to the date of a timely filed original pleading and is thus
28 itself timely even though it was filed outside an applicable statute of limitations.”).

1 In order for an amended complaint to relate back under Rule 15(c)(1)(C), the
2 following conditions must be met: “(1) the basic claim must have arisen out of the
3 conduct set forth in the original pleading; (2) the party to be brought in must have
4 received such notice that it will not be prejudiced in maintaining its defense; (3) that
5 party must or should have known that, but for a mistake concerning identity, the
6 action would have been brought against it.” *Schiavone v. Fortune*, 477 U.S. 21, 29
7 (1986).

8 Factors (1) and (2) apply to the Counterclaim which thus relates back to
9 Plaintiffs’ initial Complaint. Factor (3) is inapplicable.

10 6 Wright, Miller & Kane § 1419, at 152 (“[T]he majority view appears to be
11 that the institution of plaintiff’s suit tolls or suspends the running of the statute of
12 limitations governing a compulsory counterclaim.” “[T]he institution of plaintiff’s
13 suit tolls or suspends the running of the statute of limitations governing a
14 compulsory counterclaim.” *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 389
15 (4th Cir.1982), cert. denied, 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983)
16 (quoting 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal
17 Practice and Procedure § 1419, at 109 (1971)). This view reflects the rationale put
18 forth by Wright, Miller & Kane:

19 “This approach precludes plaintiff, when the claim and counterclaim are
20 measured by the same period, from delaying the institution of the action until the
21 statute has almost run on defendant’s counterclaim so that it would be barred by the
22 time defendant advanced it. Nor is plaintiff apt to be prejudiced by the tolling of the
23 statute, since he presumably has notice at the time he commences his action of any
24 counterclaim arising out of the same transaction as his suit. Moreover, the
25 necessarily close relationship between the timely claim and the untimely
26 counterclaim should insure that the latter is not “stale” in the sense of evidence and
27 witnesses no longer being available[.]”

28 This approach is followed in the Ninth Circuit. *Religious Tech. Center v.*
Scott, 82 F.3d 423 (9th Cir.1996); (“[A] compulsory counterclaim relates back to the
filing of the original complaint.”)

It is also the approach in California State Courts. *Jones v. Mortimer*, 28

1 Cal.2d 627, 633 (1946). A cross-complaint need only be subject-matter related to
2 the plaintiff's complaint -- i.e., arise out of the same occurrence -- to relate back to
3 the date of filing the complaint for statute of limitation purposes. Weil & Brown,
4 Cal. Practice Guide, Civil Procedure Before Trial (1987) ¶ 6:338-6:339 at p. 6-58.

5 "[T]he courts have fashioned a rule that a statute of limitations is suspended
6 or tolled as to a defendant's then unbarred causes of action against the plaintiff
7 arising out of the same transaction by the filing of the plaintiff's complaint."
8 *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.*, 122 Cal.App.3d 834,
9 844 (1981). "The principle underlying the rule that a statute of limitations is
10 suspended by the filing of the original complaint is that the plaintiff has thereby
11 waived the claim and permitted the defendant to make all proper defenses to the
12 cause of action pleaded." *Trindade v. Superior Court*, 29 Cal.App.3d 857, 859-860
13 (1973).

14
15 **IX. THE DIMINISHED PRIVACY RIGHTS ARGUMENT IS**
16 **WITHOUT MERIT**
17

18 Ostella is claiming diminished privacy rights. Firstly, this argument relates
19 only to 11th and 12th causes of action, Invasion of Privacy and does not relate
20 to any other causes of action. However, even if one believes that Taitz had
21 diminished privacy rights, which she didn't, it still did not justify fraudulent and
22 torious behavior of Ostella. 11th cause of action relates to Ostella's invasion of
23 Taitz's privacy, when she and her attorney, Philip Berg, issued fraudulent
24 subpoenas to obtain Taitz's private PayPal bank records. At a time, the case was
25 stayed, no discovery was allowed, Ostella and Berg did not provide any
26 mandatory notification to Taitz, deprived her of an ability to submit an
27 opposition and by stealth, fraudulently sent a subpoena and obtained Taitz's
28 PayPal bank account information. Similarly, as pled in the 12th cause of action,

1 they acted fraudulently and served a subpoena on the Sheriff's department to
2 obtain Taitz's confidential informant report, while the case was stayed and no
3 subpoenas allowed, and without any mandatory notification to Taitz and without
4 giving Taitz any ability to file an opposition. This tortuous, fraudulent behavior
5 is not justified, even if one claims diminished expectation of privacy.

6
7 **X. DOFF AND DEFEND OUR FREEDOMS ARE**
8 **PROTECTED INTELLECTUAL PROPERTY**
9

10 DOFF is a federally registered service mark under 15 U.S.C.A. § 1051 and 35
11 U.S.C.A. §§ 3(a), 6(a) for use in “public advocacy to promote awareness of
12 constitutional rights and freedoms,” first used on September 20, 2009. Filing
13 occurred on February 26, 2016 and the mark was officially registered on November
14 1, 2016. The registrant is Defend Our Freedoms Foundation, a California
15 Corporation located in Rancho Santa Margarita, California. The registration number
16 is 5072090.

17 For the time period between September 20, 2009 and November 1, 2016,
18 DOFF was a protected mark since the mark immediately acquired secondary
19 meaning, which is the mental association by a substantial segment of consumers and
20 potential consumers between the alleged mark and a single source of the product or
21 service *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352 (9th Cir. 1985); see also,
22 *Secular Organizations for Sobriety v. Ullrich*, 243 F.3d 1125 (9th Cir. 2000).

23 That secondary meaning has been attached to DOFF and Defend Our
24 Freedoms and their ownership by Taitz is established by the volume of persons
25 visiting Taitz's website as discussed in Ostella's motion. On page 7, lines 7 *et seq.*,
26 the motions states that “Taitz's has orchestrated an elaborate Internet campaign
27 Taitz's Internet campaign has been so successful that Alexa rates her site in the top
28 1% among a million sites. As of November 2017, the visitor counter on her pages

1 are exceeding 93 million visitors.” On page 9, lines 1-2, the motion states that
2 “Ostella knew that TAITZ is the mouth piece of DOFF.” On page 10, lines 6 and 24,
3 Ostella notes the equivalence of Taitz and Doff. On page 13, lines 19 *et seq.*, the
4 motion states that “TAITZ’s site <http://orlytaitzesq.com>, has over 93 million visitors
5 as of November 11, 2017, has over 500 linked sites....“ On page 14, lines 11 *et seq.*,
6 the motions state that Taitz’s online presence, using the marks DOFF and Defend
7 Our Freedoms, make “a very public, very clearly written statement online on her
8 <http://orlytaitzesq.com>” website.

IX. CONCLUSION and PRAYER

12 Taitz and DOFF first respectfully request that this Honorable Court strike the
13 motion on the grounds that (a) Ostella did not even request leave of Court to file
14 such a motion, (b) did not engage in the required meet and confer as required, and
15 (c) did not provide the required notice to Taitz’s and DOFF’s counsel. Additionally,

16 Taitz and Doff request that the Court deny the motion based on the facts, law
17 and argument provided herein and as will provided at the hearing on this frivolous
18 motion.

19 In the event that the Court finds the Counterclaim and Third Party Complaint
20 to be lacking in some way, Taitz and Doff request leave of court to file a first
21 amended counterclaim and third-party claim.

22 Lastly, Taitz and Doff request that the Court grant leave to file a motion for
23 attorneys fees and sanctions to compensate Taitz and DOFF for the attorney’s fees
24 that they suffered to prepare this opposition as well as the other documents and
25 activities necessitated by Ostella’s frivolous motion.

26 ///

27 ///

28 ///

1 DATED: December 10, 2017

LAW OFFICES OF ORLY TAITZ

2
3 By: /s/Orly Taitz/
Orly Taitz, Esq.
4 Attorney for Counterclaimants and
Third Party Complaint Plaintiffs,
5 ORLY TAITZ and DEFEND OUR
FREEDOMS FOUNDATION, INC.
6

7 DATED: December 10, 2017

**THE LAW FIRM OF MARC STEVEN
COLEN**

8
9
10 By: /Marc Steven Colen/
Marc Steven Colen, Esq.
11 Attorney for Counterclaimants and
Third Party Complaint Plaintiffs,
12 ORLY TAITZ and DEFEND OUR
FREEDOMS FOUNDATION, INC.
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Certificate of service

I, Orly Taitz, declare that all parties in this case were served with attached pleadings
via ECF

/s/ Orly Taitz

12.10.2017